Friedman's Express, Inc. *and* Local 478, International Brotherhood of Teamsters, AFL–CIO. Case 22–CA–19247

December 16, 1994

DECISION AND ORDER

BY MEMBERS STEPHENS, DEVANEY, AND COHEN

On July 29, 1994, Administrative Law Judge D. Barry Morris issued the attached decision. The Respondent filed exceptions and a supporting brief with attachments.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

One of the issues here is whether the Respondent violated Section 8(a)(5) of the Act by failing to bargain with the Union over the effects of its decision to close its Newark, New Jersey facility. We agree with the judge, for the reasons stated by him, that the Respondent never responded to the Union's request to engage in effects bargaining and never engaged in such bargaining. Consequently, we also agree with the judge that the Respondent thus violated Section 8(a)(5).[1]

The Respondent was engaged in the interstate transportation of freight from its Newark, New Jersey facility. The Respondent and the Union were parties to a collective-bargaining agreement effective April 1, 1991, through March 31, 1994, covering the drivers and dockmen at the Newark, New Jersey facility, the only facility at issue here. On April 5, 1993, however, the Respondent closed the Newark facility. On the same day,[2] the Respondent distributed to its Newark employees a notice of plant closing that explained, inter alia, that the cessation of operations would occur over the next several weeks and that ''it [was] anticipated that a limited number of employees [would] be retained during all, or part, of the winding down of operations.'' Also on April 5, the shop steward at the Newark facility advised Daniel McFall, the Union's business agent, that the Respondent was closing the facility.

McFall testified that after he learned of the closing on April 5, he made a series of telephone calls the same day in an attempt to contact Daniel Friedman, the Respondent's president, or Ed Nolan, the Respondent's director of operations. McFall testified that his purpose in making the calls was both to find out why the Newark facility was closing and why the Respondent had neither notified the Union of the closing nor offered to engage in effects bargaining. Although McFall failed to reach either Friedman or Nolan, he did contact Dennis Weinbrecht, the Respondent's terminal manager. Weinbrecht explained that he was not privy to information regarding the closing and did not know the reasons for it. McFall and Weinbrecht agreed, however, that the few employees who would remain for the next 2 or 3 weeks to help wind up operations would be selected on a seniority basis and that the terms of the collective-bargaining agreement would apply during that period. On the following day, April 6, McFall sent a letter to Friedman requesting, inter alia, that the Respondent contact him ''to schedule bargaining over the effects of the Company's cessation of operation on its employees represented by Local Union No. 478.'' The Respondent never responded to this April 6 letter.

In finding that the Respondent violated Section 8(a)(5) by failing to bargain with the Union over the effects of its decision to close the Newark facility, the judge considered and rejected the Respondent's argument that it had engaged in effects bargaining when McFall and Weinbrecht discussed whether the employees who remained to wind up operations would be selected by seniority and whether the terms of the collective-bargaining agreement would apply. The judge distinguished such bargaining over the ''technical aspects'' of the continuing work from true effects bargaining on the grounds that the latter covers all employees in the bargaining unit, not just a few, and that true effects bargaining encompasses such topics as severance pay, health insurance, retraining funds, and reference letters, none of which were discussed by McFall and Weinbrecht. Accordingly, the judge found that the April 5 discussion between McFall and Weinbrecht did not constitute effects bargaining.

The Respondent excepts to this finding by the judge and contends that it did engage in effects bargaining on April 5 and thus fulfilled its bargaining obligation. For the reasons explained by the judge, we find this exception without merit. In this regard, it is well settled that effects bargaining encompasses ''issues such as severance pay, seniority, pensions, health insurance, [and] job security''[3] that are of concern to all bargaining unit employees ''whose employment status will be

[1] In adopting the judge's finding that the Respondent failed to bargain on effects at a meaningful time, Member Cohen notes that the Respondent gave its closure notice on April 5, 1993, i.e., on the date of closure. The Respondent failed to establish when the closure decision was made, a fact peculiarly within its knowledge. In these circumstances, the Respondent cannot successfully argue that it gave notice of the decision as soon as it was made.

[2] In the first sentence of the second paragraph of sec. II,A of his decision, the judge gives the date incorrectly as ''March 5, 1993.'' We correct this inadvertent error.

[3] *Richmond Convalescent Hospital*, 313 NLRB 1247, 1259 (1994).

altered by the managerial decision.''[4] When viewed in this light, it is clear that the McFall-Weinbrecht April 5 telephone conversation did not constitute a complete discussion of the effects of the decision to close. At most, it was a discussion concerning the employees who would be retained for a short period. The Respondent's attempt to formalize the McFall-Weinbrecht April 5 conversation into a complete bargaining session does not succeed in disguising the fact that McFall and Weinbrecht simply agreed in their telephone conversation on the conditions under which a few employees would continue to work for 2 or 3 weeks. But the more important matter, viz, the effects of the closing on employees who would *not* be retained, was not discussed at all. The Union's letter of April 6, requesting bargaining on effects, clearly embraced this latter subject. The Respondent failed to answer that letter. That failure was a refusal to bargain.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Friedman's Express, Inc., Newark, New Jersey, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[4] *NLRB v. Royal Plating & Polishing Co.*, 350 F.2d 191, 196 (3d Cir. 1965).

Dorothy C. Karlebach, Esq., for the General Counsel.
David W. New, Esq., of Clifton, New Jersey, for the Respondent.

DECISION

STATEMENT OF THE CASE

D. BARRY MORRRIS, Administrative Law Judge. This case was heard before me in Newark, New Jersey, on June 1, 1994. Upon a charge filed on June 9, 1993,[1] a complaint was issued on July 19, alleging that Friedman's Express, Inc. (Respondent) violated Section 8(a)(1) and (5) of the National Labor Relations Act (the Act). Respondent filed an answer denying the commission of the alleged unfair labor practices.

The parties were given full opportunity to participate, produce evidence, examine and cross-examine witnesses, argue orally, and file briefs. A brief was filed by Respondent on July 11, 1994, and the General Counsel filed a letter brief on the same day.

On the entire record of the case, including my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a corporation, with an office and place of business in Newark, New Jersey, has been engaged in the interstate transportation of freight. During the 12 months preceding the issuance of the complaint, Respondent derived gross revenues in excess of $50,000 from the transportation of freight from the State of New Jersey directly to points located outside New Jersey. I find that at all material times Respondent was an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. In addition, I find that Local 478, International Brotherhood of Teamsters, AFL–CIO (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

[1] All dates refer to 1993 unless otherwise specified.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*

The Union and Respondent entered into a collective-bargaining agreement effective April 1, 1991, through March 31, 1994. The contract provided for health and welfare contributions and pension fund contributions. The parties stipulated that from December 1992 Respondent failed to make health and welfare contributions and pension fund contributions and failed to credit accrued vacation time from April 1, 1992, to March 31, 1993.

On March 5, 1993, Daniel McFall, the Union's business agent, was advised by the shop steward that Respondent was closing its Newark facility. On the same day the employees received a notice of plant closing which stated, in part, ''The complete cessation of operations of Friedman's Express, Inc. will be accomplished over the next several weeks and it is anticipated that a limited number of employees will be retained during all, or part, of the winding down of operations.'' The following day McFall sent a letter to Daniel Friedman, president of Respondent, stating:

> Please be advised that I am in receipt of a Notice of Plant Closing indicating that Friedman's Express, Inc. is closing its operations over the next sixty days.
>
> Please contact me immediately to schedule bargaining over the effects of the Company's cessation of operation on its employees represented by Local Union No. 478. In addition, please forward to me immediately the Company's proposed schedule for terminating its Newark operation.

McFall credibly testified that he received no response to his April 6 letter. Edward Nolan, Respondent's Vice President of Operations and Labor Relations, conceded that there was no response to the letter.

Friedman testified that Respondent officially ceased operations on April 5 and that a petition pursuant to Chapter 11 of the Bankruptcy Act was filed on April 6. Several employees continued to work at the facility to wind up affairs for approximately 2 weeks. McFall testified that he had discussions with the terminal manager as to the type of work the employees would be performing and that they would be working on a seniority basis.

B. *Discussion and Conclusions*

1. Benefits payments

The complaint alleges that in December 1992 Respondent unilaterally, without the Union's consent, failed to make vacation benefit payments and health, welfare and pension fund contributions. The parties stipulated that from December

1992 Respondent failed to make health and welfare contributions and pension fund contributions and failed to credit accrued vacation time from April 1, 1992, to March 31, 1993. Respondent argues that ''financial inability forced it to temporarily cease making the contributions.'' In addition, Respondent maintains that a breach of a collective-bargaining agreement does not constitute an unfair labor practice.

In *Zimmerman Painting & Decorating*, 302 NLRB 856 (1991), the respondent in that case made identical arguments to those of Respondent in this proceeding. The Board stated (id. at 857):

> The Respondent admittedly failed to make a series of contractually required fringe benefit trust fund contributions without prior notice to, or the consent of, the Union. The Respondent's first affirmative defense for not making these payments is its claim that its conduct constitutes only a breach of contract and not an unfair labor practice. The Board has consistently rejected this theory and we continue to do so here.

With respect to Respondent's additional contention, the Board stated in *Zimmerman* (id.):

> The Respondent's second affirmative defense is its claim that it is unable to make the payments because of its poor financial condition. However, a claim of economic necessity, even if proven, does not constitute an adequate defense to an allegation that an employer has unlawfully failed to abide by provisions of a collective-bargaining agreement.

Based on the above, I find that by failing to make vacation benefit payments and health, welfare, and pension fund contributions, Respondent has violated Section 8(a)(1) and (5) of the Act. See *Zimmerman Painting & Decorating*, supra, *Kuna Meat Co*., 304 NLRB 1005, 1012 (1991).

2. Effects bargaining

a. *Failure to give advance notice*

On April 5 Respondent closed its Newark facility. The complaint alleges that Respondent did not give the Union adequate notice of its decision to close and has failed and refused to engage in effects bargaining with the Union over the closing of the facility. On April 5 the employees received a notice of plant closing and on the same day the Union was so advised. On the following day the Union's business agent sent a letter to Daniel Friedman, president of Respondent, requesting that Friedman ''contact me immediately to schedule bargaining over the effects of the Company's cessation of operation on its employees represented by Local Union No. 478.'' It was conceded by Respondent that there was no response to the Union's request for effects bargaining.

First National Maintenance Corp. v. NLRB, 452 U.S. 666, 681–682 (1981), established the principle that an employer who closes its operation has a duty to bargain with the Union representing its employees over the effects on those employees ''in a meaningful manner and at a meaningful time.'' A ''meaningful time'' has been construed as a time prior to the cessation of operations. *Los Angeles Soap Co*., 300 NLRB 289 (1991); *Reeves Bros*., 306 NLRB 610, 612 (1992). This does not apply, however, where emergency circumstances preclude advance notice to the Union of the planned closure. *Reeves Bros*., id.

Respondent essentially argues that there were indeed ''emergency circumstances'' which precluded advance notice to the Union. Thus, Respondent maintains in its brief, that the ''company's failure to obtain additional capital coupled with the abrupt decline in business culminated with the regrettable and unforeseeable April 6 institution of bankruptcy proceedings.'' The record, however, does not contain sufficient evidence to warrant a finding that Respondent did not have sufficient time to notify the Union of its intentions to close the facility. The only evidence concerning the ''emergency'' nature of the circumstances is the notice of plant closing which was distributed to employees on April 5, which states, ''Please be advised that all sites of Friedman's Express, Inc. are closing due to the inability of the corporation to secure sufficient capital to carry on the business of the corporation . . . .'' In addition, Friedman testified that Respondent filed a petition under Chapter 11 of the Bankruptcy Act on April 6. There is no evidence in the record of when Respondent first became aware that it was unable to ''secure sufficient capital to carry on the business.'' As an additional reason for the institution of bankruptcy proceedings Respondent's brief states that Respondent was confronted with an ''abrupt decline in business.'' Yet, the record contains no statistics concerning the alleged decline in business nor is there any indication of when this decline was first discovered.

Respondent argues that it is General Counsel's burden to show that Respondent was not faced with an emergency. I disagree. I believe that once it has been shown that an employer has ceased its operations without prior notification to the Union, the burden shifts to the employer to show that emergency circumstances precluded advance notice to the Union. Thus, in *Reeves Bros*., supra at 612 fn. 15, it is stated:

> The Respondent contends ''emergency circumstances'' warranted the shutdown (relying on the recitations advanced in its notices to the unit employees and the Union). Those recited reasons were not supported by any factual evidence either supplied to the Union or produced at the hearing . . . . In the absence of such evidence, I reject the contention.

It is clear from the above quoted paragraph in *Reeves Bros*. that respondent in that case bore the burden of demonstrating that ''emergency circumstances'' existed. The judge there concluded that the burden was not met. Similarly, in this proceeding, I find that Respondent has not shown that emergency circumstances existed which precluded advance notice to the Union of the planned closure.

b. *Negotiations subsequent to the closing of the facility*

After the cessation of operations several employees continued working for approximately 2 weeks to wind up affairs. The union business agent and the Newark terminal manager discussed what type of work these employees would do and that they would be put to work on a seniority basis. Based on this, Respondent argues that in fact the parties ''engaged in bargaining over effects of Friedman's shutdown.'' As was stated in *Los Angeles Soap Co*., supra at 295:

> So-called effects bargaining provides the Union with an opportunity to bargain in the employees' interest for such benefits as severance pay, payments into the pension fund, preferential hiring if the employer continues operating at other plants and reference letters with respect to other jobs . . . . To this list of possible benefits which a union might wish to bargain over when the plant closes, I include health insurance, pension benefits and retraining funds.

The fact that the union representative and a representative of Respondent discussed several technical aspects of the work which was being performed by the few employees who remained to wind up the affairs of the facility is hardly what is contemplated by effects bargaining. In the first place, effects bargaining covers all the employees at the facility, not just the few who remain to wind up. In addition, as pointed out above in *Los Angeles Soap Co*., supra, effects bargaining provides the Union with an opportunity to discuss with Respondent such benefits as severance pay, health insurance, retraining funds and reference letters with respect to other jobs. None of that was done in the instant proceeding. As stated in *Louisiana Dock Co*., 293 NLRB 233, 237 (1989), enf. denied on other grounds 909 F.2d 281 (6th Cir. 1990), ''whatever bargaining the Union and LDC had engaged in regarding the effects of the layoffs *after* the layoffs had occurred is inadequate to fulfill LDC's affirmative obligations in this regard.'' (Emphasis added.) See *P. J. Hamill Transfer Co*., 277 NLRB 462, 463 (1985).

CONCLUSIONS OF LAW

1. At all material times Respondent was an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. The following employees of Respondent constitute an appropriate unit for the purposes of collective-bargaining within the meaning of the Act:

> All full-time and casual drivers, all full-time and casual dock workers, but excluding all office clerical and managerial employees, guards and supervisors as defined in the Act.

4. Respondent violated Section 8(a)(1) and (5) of the Act by failing to make vacation benefit payments and health, welfare, and pension fund contributions.
5. Respondent violated Section 8(a)(1) and (5) of the Act by failing to engage in effects bargaining with the Union prior to closing its Newark facility.
6. The aforesaid unfair labor practices constitute unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I find it necessary to order Respondent to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. Since Respondent has no place of business to post a notice to employees regarding the violations and the remedy, I shall recommend that Respondent be ordered to mail signed copies of the notice to the Union and to all of Respondent's employees represented by the Union and employed as of April 5, 1993. See *Los Angeles Soap Co*., supra, 300 NLRB at 296.

Respondent having violated the Act by failing to make vacation benefit payments and health, welfare, and pension fund contributions, I shall order Respondent to make such payments. I shall also order Respondent to make whole unit employees for any losses they may have suffered as a result of its failure to make the required payments, *Kraft Plumbing & Heating*, 252 NLRB 891 (1980), with such amounts to be computed in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).[2] See also *Merryweather Optical Co*., 240 NLRB 1213 (1979).

As a result of Respondent's unlawful failure to bargain in a meaningful manner and at a meaningful time over the effects of its cessation of operations, I shall recommend that in order to effectuate the purposes of the Act, Respondent bargain with the Union concerning the effects on its employees of the closing of its Newark facility. Pursuant to *Transmarine Navigation Corp*., 170 NLRB 389 (1968), I shall order limited backpay. See also *Los Angeles Soap Co*., supra, 300 NLRB at 296–297. Respondent shall pay employees represented by the Union backpay at the rate of their normal wages when last in Respondent's employ from 5 days after date of the Board's Order until the occurrence of the earliest of the following conditions: (1) the date Respondent bargains to agreement with the Union on those subjects pertaining to the effects of the closing of Respondent's operations on its employees; (2) a bona fide impasse in bargaining; (3) the failure of the Union to request bargaining within 5 days of the Board's Order, or to commence negotiations within 5 days of Respondent's notice of its desire to bargain with the Union; or (4) the subsequent failure of the Union to bargain in good faith; but in no event shall the sum to any of these employees represented by the Union exceed the amount he or she would have earned as wages from April 5, 1993, the date on which Respondent ceased operations at its Newark facility, to the time he or she secured equivalent employment elsewhere, or the date on which Respondent shall have offered to bargain, whichever occurs sooner; provided, however, that in no event shall this sum be less than these employees would have earned for a 2-week period at the normal rate of their normal wages when last in the Respondent's employ. Interest on all such sums shall be paid in the manner prescribed in *New Horizons for the Retarded*, supra, 283 NLRB 1173.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[3]

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[2] Under *New Horizons*, interest is computed at the ''short-term Federal rate'' for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621.

[3] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

The Respondent, Friedman's Express, Inc., Newark, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing to make required vacation benefit payments and required health, welfare, and pension fund contributions.

(b) Failing to bargain in good faith with Local 478, International Brotherhood of Teamsters, AFL–CIO concerning the effects of the closing of its Newark facility on the employees in the following appropriate unit:

> All full-time and casual drivers, all full-time and casual dock workers, but excluding all office clerical and managerial employees, guards and supervisors as defined in the Act.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Transmit to the Union health, welfare, and pension fund contributions from December 1992 and credit accrued vacation time from April 1, 1992, to March 31, 1993.

(b) Make whole unit employees for any losses of benefits they may have suffered because of Respondent's failure to make the required payments, in the manner set forth in the remedy section of this decision.

(c) Pay the employees represented by the Union who were terminated on and after April 5, 1993, their normal wages for the appropriate period set forth in the remedy section of this decision.

(d) On request, bargain in good faith with the Union with respect to the effect on its employees of the decision to terminate the operations at the Newark facility and, on request, embody in a signed agreement any understanding reached.

(e) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(f) Mail an exact copy of the attached notice marked ''Appendix''[4] to the Union and to all employees represented by the Union and employed by Respondent on April 5, 1993, in the above-described appropriate unit at the Newark facility. Copies of said notice on forms provided by the Regional Director for Region 22, after being duly signed by Respondent's authorized representative, shall be mailed immediately upon receipt as directed herein.

(g) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
ISSUED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing in which all parties were afforded the opportunity to present evidence it has been found that we violated the National Labor Relations Act in certain respects and we have been ordered to mail this notice.

WE WILL NOT refuse to make vacation benefit payments and health, welfare, and pension benefit fund contributions.

WE WILL NOT fail or refuse to give notice to the Union representing our employees of the shutdown of our facilities in ample time prior to such shutdown to afford the Union the opportunity to engage in meaningful bargaining over the effects of the shutdown on the employees represented by the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of their rights under Section 7 of the National Labor Relations Act.

WE WILL make required vacation benefit payments and the required health, welfare, and pension fund contributions and WE WILL make whole unit employees for any losses of benefits that they may have suffered because of our failure to make such payments, with interest.

WE WILL, on request, bargain collectively in good faith with Local 478, International Brotherhood of Teamsters, AFL–CIO over the effect of our closing of the Newark facility on our employees represented by the Union and, on request, WE WILL embody in a signed agreement any understanding reached.

WE WILL pay the employees represented by the Union who were employed at the Newark facility on April 5, 1993, their normal wages for a period specified by the National Labor Relations Board, plus interest.

FRIEDMAN'S EXPRESS, INC.